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No.

Sup. Ct. - Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1983

JOHN J. TONER, Judge
Petitioner,

vs.

STATE ex rel. FREDDIE CODY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Ohio Supreme Court

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QUESTION PRESENTED

1. WHETHER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION MANDATES THAT AN INDIGENT PATERNITY DEFENDANT BE APPOINTED COUNSEL AT STATE'S EXPENSE WHEN THE COMPLAINANT-MOTHER AND HER CHILD ARE RECIPIENTS OF PUBLIC-ASSISTANCE AND ARE REPRESENTED BY THE COUNTY PROSECUTING ATTORNEY'S OFFICE?

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No.

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STATE ex rel. FREDDIE CODY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Ohio Supreme Court

The petitioner, John J. Toner, Judge, respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the Ohio Supreme Court entered in this proceeding on December 7, 1983.

OPINION BELOW

The opinion of the Ohio Supreme Court appears in the Appendix hereto. *State, ex rel. Cody v. Toner* (1983), 8 Ohio St. 3d 22.

JURISDICTION

The judgment of the Ohio Supreme Court was entered on December 7, 1983. This Court's jurisdiction is invoked under 28 United States Code Section 1257(3).

The Supreme Court of Washington in *Washington v. Walker*, 87 Wash. 2d 443 (1976), has held that the due process clause of the United States Constitution does not require the appointment of counsel in a paternity proceeding when the complainant was represented by the County prosecutor and the defendant apparently was indigent. Accordingly, the opinion of the Ohio Supreme Court in this matter may be in conflict with the decision of another state court of last resort on the protections afforded by the due process guarantees of the United States Constitution. 28 U.S.C. Rules of the Supreme Court of the United States 17(1)(B).

Further, the Ohio Supreme Court has decided an important federal question which has not been but should be settled by this Court. 28 U.S.C. Rules of the Supreme Court of the United States 17(1)(B).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendment to the United States Constitution. The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The applicable section of the Fourteenth Amendment to the United States Constitution provides as follows:

> Amendment 14—Section 1
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On October 1, 1979, Elizabeth Morgan, a recipient of the Federal Aid to Families with Dependent Children benefits, filed a complaint in the Court of Common Pleas of Cuyahoga County, Ohio, alleging that Freddie Cody, Respondent, was the father of her child. Miss Morgan was represented by the Cuyahoga County Prosecuting Attorney. The Respondent was to be represented in this paternity action by Legal Aid. Legal Aid, however, withdrew when it was discovered that Legal Aid had also represented Miss Morgan in a divorce action and hence a conflict existed.

The Respondent, an indigent, was then left without the representation of Legal Aid. Respondent then moved for the presiding judge of Juvenile Court, John J. Toner, the Petitioner, for appointment of counsel. The Petitioner denied the motion and a subsequent appeal to the Court of Appeals of the Eighth Judicial District, Cuyahoga County, Ohio was denied for lack of a final order on

September 13, 1982. The Ohio Supreme Court then refused to certify the record in the case.

Thereafter, Respondent obtained the services of an attorney for the American Civil Liberties Union for the sole purpose of asserting his constitutional right to court-appointed counsel. He filed an original action in mandamus in the Court of Appeals for Cuyahoga County, Ohio seeking to compel the Petitioner to grant his motion for appointment of counsel. On February 15, 1983, the Court of Appeals for Cuyahoga County, Ohio dismissed Respondent's complaint pursuant to Petitioner's motion.

On appeal as of right, the Ohio Supreme Court held that the denial of court-appointed counsel for an indigent paternity defendant who faces the State as an adversary, when the complainant-mother and her child are recipients of public assistance, violates the due process guarantees of the Ohio and United States Constitutions.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. THE UNITED STATES SUPREME COURT HAS YET TO ADDRESS WHETHER AN INDIGENT PATERNITY DEFENDANT HAS A CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF COUNSEL AT STATE'S EXPENSE WHEN THE COMPLAINANT-MOTHER AND HER CHILD ARE RECIPIENTS OF PUBLIC ASSISTANCE AND REPRESENTED BY A STATE AGENCY. THIS IS AN IMPORTANT AREA OF CONSTITUTIONAL LAW WHICH AFFECTS THE RIGHTS OF INDIGENTS AND FEDERAL/STATE WELFARE ADMINISTRATION. IT IS AN UNSETTLED AREA OF LAW AND THERE APPEAR TO BE CONFLICTING DECISIONS IN THE HIGHEST COURTS OF DIFFERENT STATES ON THIS ISSUE.

The Ohio Supreme Court in *Cody, supra,* cited the United States Supreme Court rulings in *Little v. Streater,* 452 U.S. 1, 68 L. Ed. 2d 627, 101 S. Ct. 2202 (1981), and *Mathews v. Eldridge,* 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), as support for its holding.

In *Little, supra,* the United States Supreme Court held that State of Connecticut's denial of the costs of blood grouping tests to an indigent paternity defendant who faces the state as an adversary when the complainant-mother and her child are recipients of public assistance, violates the due process guarantee of the Fourteenth Amendment to the United States Constitution.

In *Little, supra,* this Court weighed the three elements of *Eldridge, supra,* to determine if a due process violation existed. The three elements of *Eldridge* which all courts

must weigh in determining whether a due process violation exists are as follows: (1) The private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through procedures used and probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and fiscal administrative burdens that additional or substitute procedural requirements would entail.

In weighing the *Eldridge, supra,* criterion, the Supreme Court noted that in Connecticut, unlike Ohio, there exists an evidentiary statute which provided that the reputed father's testimony alone was insufficient to overcome the mother's prima facie case. Further, paternity proceedings in Connecticut have quasi criminal undertones.

In *Lassiter v. Department of Social Services of Durham County, North Carolina,* 452 U.S. 18, 68 L. Ed. 2d 640, 101 S. Ct. 2153 (1981), the United States Supreme Court held that the State trial court's failure to appoint counsel for an indigent parent in a civil proceeding for termination of parental status did not deprive the parent of the due process of law.

This Court in *Lassiter, supra,* stated that there is a presumption of no right to appointed counsel in the absence of at least a potential deprivation of physical liberty. The Court further noted that as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel. A determination was then made as to whether the due process criterion of *Eldridge, supra,* rebutted this presumption of no right to appointed counsel.

Since Ohio paternity proceedings are entirely civil and the most serious action a court could impose for a will-

ful failure to obey the judgment of the court is that of civil contempt, then it is apparent that the Ohio Supreme Court in *Cody, supra*, should have made a determination as to whether the *Eldridge, supra*, criterion rebutted the presumption of no right to counsel. Ohio Revised Code, Section 3111.08 and 3111.15(C) effective June 29, 1982. Instead, the Ohio Supreme Court merely weighed the three criterion in *Eldridge, supra*. The Ohio Supreme Court's failure to assess the facts in *Cody, supra*, in this manner leaves the decision in jeopardy.

Accordingly, based on *Lassiter, supra*, there is no constitutional right to counsel in civil paternity cases.

Further, in merely weighing the three factors in *Eldridge, supra*, the Ohio Supreme Court failed to note the following factors: (1) paternity actions are entirely civil in Ohio, Section 3111.08 of the Ohio Revised Code (Eff. 6/29/82); (2) paternity actions have no criminal overtones, the most serious sanction the court could impose for a willful failure to obey the judgment of the court is that of civil contempt. Section 3111.15(C) of the Ohio Revised Code (Eff. 6/29/82); (3) blood tests are paid for by the government and many times are determinative in excluding paternity defendants whether or not he is represented by an attorney. Section 3111.09 of the Ohio Revised Code (Eff. 6/29/82); (4) the tremendous burden the County of Cuyahoga must bear in paying for counsel for indigent paternity defendants who previously were represented by the Legal Aid Society, the federally funded body designed and funded to represent indigents; (5) the state or prosecutor's involvement in these proceedings merely reflects a contractual relationship between his office and the Welfare Department. The county prosecutor often represents other county agencies in civil disputes. The involvement of the county prosecutor cannot transform a civil case into a criminal proceeding.

The Ohio Supreme Court has extended an indigent's right to counsel beyond any recognizable Federal Constitutional parameters. The United States Supreme Court has consistently recognized that indigents have a constitutional right to appointed counsel in those cases where they face incarceration if convicted. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

Further, the *Cody, supra*, decision cannot exist under the umbrella of the Ohio Constitution's Due Process Clause since the Aid to Dependent Children program is federally sponsored under Title IV-D of the Social Security Act, 49 Stat. 629 (1935), 42 U.S.C. 301, as amended; Federal regulations promulgated pursuant to 42 U.S.C. 302 require the A.D.C. recipient complainant-mother to bring a paternity action as a condition of her continuing eligibility 45 C.F.R. 232.12; Contrary to the Ohio Supreme Court's assumption in *Cody, supra*, that these types of paternity cases are prosecuted at the State's expense, federal funding of the county prosecutor's administrative costs is 70 percent. 45 C.F.R. 304.21 (AM. Oct. 1, 1982); the *Cody, supra*, decision was based mainly on cases deciding federal constitutional issues.

The federal participation is evident and the Ohio Supreme Court's decision could substantially effect the IV-D program.

Further, there appears to be a conflict between the *Cody, supra*, decision and Washington Supreme Court's decision in *Washington v. Walker*, 87 Wash. 2d 443 (1976).

CONCLUSION

The *Cody, supra,* decision has extended this Court's previously recognized parameters concerning an indigent paternity defendant's right to counsel. This Court should accept and decide this unsettled issue because of its constitutional and practical importance.

Therefore, petitioner requests that this court grant a writ of certiorari.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided December 7, 1983)

No. 83-420

IN THE SUPREME COURT OF OHIO

THE STATE, ex rel. CODY,
Appellant,

v.

TONER, Judge,
Appellee.

[8 Ohio St. 3d 22]

Paternity—Attorneys at law—Mandamus lies to compel court appointment of counsel for indigent defendant—Denial of writ violates due process, when.

O. JUR 3D *Family Law* § 253.

The denial of court-appointed counsel for an indigent paternity defendant who faces the state as an adversary, when the complainant-mother and her child are recipients of public assistance, violates the due process guarantees of the Ohio and United States Constitutions.

APPEAL from the Court of Appeals for Cuyahoga County.

On October 1, 1979, Elizabeth Morgan, a recipient of Aid to Families with Dependent Children benefits, filed a complaint in the Court of Common Pleas of Cuyahoga County, alleging that Freddie Cody, appellant herein, was the father of her child. Appellant was to be represented

in this paternity action by a Legal Aid attorney. That attorney withdrew, however, when it was discovered that Legal Aid had represented Morgan in a divorce action.

This conflict of interest left appellant, an indigent, without legal representation. He moved the presiding judge, John J. Toner, appellee herein, for appointment of counsel. Appellee denied the motion and appeal therefrom was dismissed for lack of a final order.

Thereafter, appellant obtained the services of an attorney from the American Civil Liberties Union for the sole purpose of asserting his constitutional right to court-appointed counsel. He filed an original action in mandamus in the Court of Appeals for Cuyahoga County, seeking to compel appellee-judge to grant his motion for appointment of counsel. On February 15, 1983, the court of appeals dismissed the complaint pursuant to appellee's motion.

The cause is now before this court upon an appeal as of right.

Mr. Charles M. Delbaum, for appellant.

Mr. John T. Corrigan, prosecuting attorney, and *Mr. Kenneth J. Knabe*, for appellee.

CLIFFORD F. BROWN, *J.* It is well-settled that in order for a writ of mandamus to issue, the relators must show: "'(1) that they have a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to perform the acts, and (3) that relators have no plain and adequate remedy in the ordinary course of the law.'" *State, ex rel. Akron Fire Fighters, v. Akron* (1978), 54 Ohio St. 2d 448, 450 [8 O.O.3d 443]; *State, ex rel. Harris, v. Rhodes* (1978), 54 Ohio St. 2d 41, 42 [8 O.O.3d 36].

The court of appeals held that relator herein has an adequate remedy in the ordinary course of the law by way

of appeal. However, the mere existence of the remedy of appeal does not necessarily bar the issuance of a writ of mandamus. *State, ex rel. Emmich, v. Indus. Comm.* (1947), 148 Ohio St. 658 [36 O.O. 265]. The question is whether such remedy is "*adequate* under the circumstances." (Emphasis *sic.*) *State, ex rel. Butler, v. Demis* (1981), 66 Ohio St. 2d 123, 124 [20 O.O.3d 121].

In the instant case, if relator must wait for an appeal to establish his alleged right to have court-appointed counsel, he will be denied the opportunity to be legally represented throughout the course of the adjudication and disposition of his case. Accordingly, although relator may ultimately appeal an adverse decision rendered in the paternity action, that remedy cannot be said to be "adequate under the circumstances." *Id.*

We turn then to the principal issue in this case: whether the denial of court-appointed counsel for an indigent paternity defendant who faces the state as an adversary, when the complainant-mother and her child are recipients of public assistance, violates the due process guarantees of the Ohio and United States Constitutions. Based on this court's decision in *Anderson v. Jacobs* (1981), 68 Ohio St. 2d 67 (22 O.O.3d 268], we hold that it does.

In *Anderson*, this court held that "denial of blood grouping tests to an indigent paternity defendant, who is unable to prepay for such tests, and who faces the state as an adversary when the complainant-mother and her child are recipients of public assistance, violates the due process guarantee of the Fourteenth Amendment to the United States Constitution. (*Little v. Streater* [(1981), 452 U.S. 1], 69 L.Ed. 2d 627, followed.)" In so concluding, this court balanced three factors: (1) the private interest affected, (2) the risk of error if current procedures are used

versus the probative value of additional procedural safeguards, and (3) the burden which the proposed additional procedural safeguards would place upon the government. See *Mathews v. Eldridge* (1976), 424 U.S. 319, 335.

Applying this analysis to the facts of the present case, we find the following:

First, the private interests implicated here are substantial. As recognized by the United States Supreme Court in *Little, supra,* at page 13: "* * * Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance, at issue is the creation of a parent-child relationship. * * * Obviously, both the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination."

Second, these substantial interests and the integrity of the paternity determination itself could easily be damaged if appellant herein were to be denied counsel during the proceedings. Emphasizing the fact that the paternity case below was initiated at the state's insistence and prosecuted at the state's expense, we realize that appellant is presented with a formidable task if he should be required to defend himself. In *State, ex rel. Heller, v. Miller* (1980), 61 Ohio St. 2d 6 [15 O.O.3d 3], this court held at paragraph two of the syllabus that, "[i]n actions instituted by the state to [terminate parental rights, the constitutional] * * * guarantees of due process and equal protection of the law require that indigent parents be provided with counsel * * * at public expense for appeals as of right." In reaching this result, this court, at page 7, stated: "* * * Relators cannot effectively appeal without * * * counsel. If Relators continue their appeal *pro se* * * * any appeal will be

ineffectively presented." This reasoning is applicable, if not more compelling, with regard to cases at the trial level.[1]

Given the value of the right to blood grouping tests (available under R.C. 3111.09[A]), which right could feasibly go unasserted by one unfamiliar with the law, and the likelihood that expert witnesses will be called to testify should blood grouping tests be ordered (see R.C. 3111.09 [B]), it appears that one unknowledgeable of his rights and unskilled in the art of advocacy could easily go astray in conducting his defense. It can only be assumed that court-appointed counsel would provide adequate protection against these dangers.

Finally, we weigh the state's asserted monetary interest in refusing to provide legal representation for an indigent defendant in a paternity action. Although we understand the state's desire to proceed as economically as possible, the state's financial stake in providing appellant with court-appointed counsel during the paternity proceedings is hardly significant enough to overcome the private interests involved. Instead, protection of the aforementioned substantial interests of the appellant and the integrity of the paternity action itself must be considered as being of utmost importance.

We therefore hold that the denial of court-appointed counsel for an indigent paternity defendant who faces the state as an adversary, when the complainant-mother and her child are recipients of public assistance, violates the due process guarantees of the Ohio and United States Constitutions. Since appellant thus has a right to court-

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1. As stated in *Little, supra*, at page 14, and reiterated in *Anderson, supra*, at page 74, paternity cases are plagued by "the usual absence of witnesses, [and] the self-interest coloring the testimony of the litigants * * *."

appointed counsel, appellee was under a concomitant duty to grant the appellant's motion. There being no adequate remedy in the ordinary course of the law, appellant is entitled to issuance of the requested writ of mandamus.

Accordingly, the judgment of the court of appeals is reversed and the writ is allowed.

Judgment reversed and writ allowed.

CELEBREZZE, C.J., W. BROWN, SWEENEY, LOCHER and J. P. CELEBREZZE, JJ., concur.

HOLMES, J., dissents.

HOLMES, J., dissenting. The majority opinion seeks to extend the guarantees of due process to include an indigent paternity defendant who faces the state as an adversary. Since a paternity proceeding is a civil action without criminal overtones, I must dissent.

The United States Supreme Court has clearly established that indigents have the constitutional right to the appointment of legal counsel in those criminal cases where they will be incarcerated if convicted. *Argersinger v. Hamlin* (1972), 407 U.S. 25. In addition, such defendants have the right to appointed counsel in appeals as of right. *Douglas v. California* (1963), 372 U.S. 353. However, these rights belong only to indigents involved in criminal proceedings. It does not follow that such rights should automatically be granted in civil proceedings, regardless of the importance of the right at stake therein.

As I stated in my dissenting opinion in *Anderson v. Jacobs* (1981), 68 Ohio St. 2d 67, at 76 [22 O.O.3d 268], the fundamental purpose of a paternity suit is to identify the father of a child born out of wedlock. The result sought in such an action is to better provide for the child. There is no criminal aspect to the proceeding, nor may an

indigent father be later incarcerated for failure to pay child support.

In my view, an indigent paternity defendant has not been denied due process of law when he has had all the procedural hearings afforded to him by law, with the rulings made by a judge upon all necessary points of law and fact. Therefore, we are not required to construe the Due Process Clause as mandating the provision of legal counsel at a civil paternity suit for all those unable to provide such for themselves.

My query in *State, ex rel. Heller, v. Miller* (1980), 61 Ohio St. 2d 6, dissenting opinion, at 15 [15 O.O.3d 3], as to where the right to have appointed counsel at state expense may end, is equally applicable here.[2]

Accordingly, I would deny the writ as there is no clear legal right for its issuance.

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2. "Where will the right to have appointed counsel and transcripts at state expense end? Indigent citizens may claim that many other activities or elements of their lives are based upon a constitutionally protected civil right, and seek appointed counsel in a legal proceeding, whether the nature of such proceeding be within the realm of contract, negligence or property law."

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NO. 83-1408

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1983

JOHN J. TONER, Judge
Petitioner,

vs.

STATE ex rel. FREDDIE CODY,
Respondent.

ON WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

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MARCH, 1984

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STATUTES

Ohio Revised Code §§3111.02, 3111.03, 3111.07 (A), 3111.08 (A), 3111.09 (A) & (B), and 3111.12 (D) as set forth in the Appendix.

STATEMENT OF THE CASE

The statement of the case presented by petitioner is accurate, except that at page 4, petitioner failed to note that the Court of Appeals dismissed respondent's complaint in mandamus on February 15, 1983 because it believed there was an adequate remedy at law. The Court of Appeals did not address the merits of respondent's constitutional claims.

SUMMARY OF ARGUMENT

1. The state court decision below rests upon an adequate and independent state ground. The state court did not believe that its decision was compelled by federal law. Therefore, this Court lacks jurisdiction to review the decision.
2. The decision below is correct in light of the complexity of Ohio's paternity statutes. Therefore, this Court

should exercise its discretion not to review the decision.

In State, ex rel. Cody v. Toner, Judge, 8 Ohio St. 3d 22 (1983), the Ohio Supreme Court held as follows:

> The denial of court-appointed counsel for an indigent paternity defendant who faces the state as an adversary, when the complainant-mother and her child are recipients of public assistance, violates the due process guarantees of the Ohio and United States Constitutions. (emphasis added)

Judge Toner has now requested a writ of certiorari to review this decision. It will be shown below that the writ should not be granted because this Court lacks jurisdiction, and because even if there were jurisdiction, the holding below is correct and does not warrant review.

ARGUMENT

1. The state court decision below rests upon an adequate and independent state ground. The state court did not believe that its decision was compelled by federal law. Therefore, this Court lacks jurisdiction to review the decision.

The key portion of the decision below, State, ex rel. Cody v. Toner, 8 Ohio St. 3d 22 (1983), is its discussion of the need for counsel to insure the accuracy and integrity of paternity proceedings in Ohio. In this portion of the opinion, the Court reaffirms the vitality of an Ohio Supreme Court case interpreting the Ohio constitutional guarantee of due process in a manner which is broader than this Court's interpretation of the United States Constitution. For this reason, it is clear that Cody does not present a sit-

uation where "the state court decided the case the way it did because it believed that federal law required it to do so." Michigan v. Long, 103 S.Ct. 3469, 3471 (1983). Therefore, this Court does not have jurisdiction to review the state court judgment. Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 490, (1965).

In analyzing the importance of appointed counsel to the integrity of the paternity proceedings, the court below looked for guidance to State, ex rel. Heller v. Miller, 61 Ohio St. 2d 6 (1980). (Petition Appendix, hereafter P. App. A4) In Heller, the Ohio Supreme Court held that in a proceeding to terminate parental status, indigent parents have due process and equal protection rights under the Ohio and United States Constitutions to appointed counsel for appeals as of

right. In Cody, the Court extended this holding to paternity cases at the trial level. (P. App. A5). The Heller decision was reaffirmed despite the fact that subsequently, this Court in Lassiter v. Department of Social Services of Durham County, North Carolina, 452 U.S. 18 (1981), held that the failure to appoint counsel generally in proceedings for termination of parental status did not offend the due process clause of the United States Constitution. As the Ohio Supreme Court is aware of Lassiter (see, Anderson v. Jacobs, 68 Ohio St 2d 67, 73 (1981)), the logical inference from this sequence of events is that the court below still considers State ex rel. Heller v. Miller, supra, as good authority with respect to its interpretation of the Ohio Constitution, despite the Lassiter ruling.

It is clear from the precedent cited on the face of the decision that the court below did not believe itself compelled by federal precedent to recognize the importance of counsel to the integrity of a civil proceeding. See, Michigan v. Long, supra, 103 S. Ct. at 3477. Because Heller remains good law in Ohio, a decision by this Court on the merits would be nothing more than an advisory opinion to the Ohio Supreme Court. With an independent and adequate state ground controlling the Ohio Supreme Court's decision, this Court does not have jurisdiction to review it.

2. The decision below is correct in light of the complexity of Ohio's paternity statutes. Therefore, this Court should exercise its discretion not to review the decision.

Even if this Court has jurisdiction to review the decision below because the

Ohio Court felt compelled by federal law to reach the decision it did, which respondent adamantly denies, this Court should decline to exercise such jurisdiction.

Under Ohio's paternity statutes, an indigent defendant is confronted with an extensive array of rights and potential obstacles both before and during trial. He clearly needs the assistance of counsel to guide him in his choices and conduct.

These statutory provisions include the following. The defendant has a right, upon motion, to have blood grouping tests performed without prepayment of costs. O.R.C. §3111.09 (A). Expert testimony regarding the results of these tests is admissible at trial even if the results do not exclude him as the father. O.R.C. §3111.09 (B). The defendant has a right to a trial by jury, but he must file a timely

demand. O.R.C. §3111.12 (D). He should be familiar with all the Ohio Rules of Civil Procedure including the rules governing discovery, since these rules govern the proceedings unless a different procedure is specifically provided for by statute. O.R.C. §3111.08 (A). Where, as here, the child was born during a marriage to another man, the ex-husband may be joined in the action if this matter is brought to the Court's attention. O.R.C. §3111.07 (A). In four specified sets of circumstances, a defendant will be required to overcome a presumption of paternity by clear and convincing evidence. O.R.C. §3111.03. This unusually heavy burden will not easily be understood, let alone met, by the average paternity defendant unaided by counsel.

This scheme is far more complex than

the procedurally straightforward parental status termination proceeding which the Court addressed in Lassiter, supra, 452 U.S. at 28-29. Ohio's paternity statutes require difficult decisions both before and at trial. By contrast, in the parental status termination proceedings discussed in Lassiter, expert testimony is unusual; there are no sophisticated scientific test results to be analyzed and evaluated; there is no provision for a jury trial; the full panoply of civil rules, including discovery procedures, does not apply. Furthermore, under the North Carolina procedure at issue in Lassiter, the state often appears without counsel. In Ohio paternity cases brought to recover a welfare set-off, the state routinely appears by counsel.

Under these circumstances, the Ohio

Supreme Court concluded that one "unknowledgeable of his rights could easily go astray in conducting his defense." (P. App. A5). Since the Ohio Supreme Court concluded that the complexity of this type of proceeding will overwhelm the uncounselled defendant in this class of cases, the presumption against the right to counsel in civil proceedings is negated, and the Ohio Supreme Court's decision is not inconsistent with Lassiter.

The Ohio statutory scheme also deflates petitioner's last ditch contention. In the last sentence of his argument, petitioner contends that "there appears to be a conflict between the Cody, supra, decision and Washington Supreme Court's decision in Washington v. Walker, 87 Wash. 2d 443 (1976)."(Petition at p. 8) (sic) (case is State v. Walker). This conflict is more apparent than real because the two cases

turn on different facts, procedures, and law. For example, in Cody, the court below placed great weight on the need for learned assistance with respect to the blood grouping tests authorized without prepayment by state law and on "the likelihood that expert witnesses will be called to testify should blood grouping tests be ordered." (P. App. A5). By contrast, at the time State v. Walker, supra, was decided, Washington state law did not authorize blood grouping tests without prepayment. Further, expert testimony would have been largely unnecessary because the tests available in 1976 were far less sophisticated and complex than those available in 1983. Finally, the decision of the Washington Supreme Court predates and is not informed by this Court's decision in Lassiter, supra.

The Ohio Supreme Court is particularly well situated to evaluate the complexity of Ohio's paternity procedures and the need for counsel to insure the fairness and accuracy of the proceedings. Accordingly, this Court should deny review.

CONCLUSION

Because the decision below rests upon an adequate and independent state ground, this Court lacks jurisdiction to review it. Even if there were jurisdiction, this Court should decline to exercise it because the Ohio decision is correct. The petition should accordingly be denied.

Respectfully submitted,

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The assistance of Lois Robinson and Steve Klug, students at the Cleveland-Marshall College of Law, in the research and preparation of this brief is gratefully acknowledged.

APPENDIX

The Ohio Revised Code Sections cited in this brief are as follows:

3111.02 Parent and child relationship; how established

The parent and child relationship between a child and the child's natural mother may be established by proof of her having given birth to the child or pursuant to this chapter. The parent and child relationship between a child and the natural father of the child may be established pursuant to this chapter. The parent and child relationship between a child and the adoptive parent of the child may be established by proof of adoption or pursuant to Chapter 3107. of the Revised Code.

3111.03 Presumptions as to father and child relationship

(A) A man is presumed to be the natural father of a child under any of the following circumstances:
(1) The man and the child's mother are or have been married to each other, and the child is born during the marriage or is born within three hundred days after the marriage is terminated by death, annulment, divorce, or dissolution or after the man and the child's mother separate

pursuant to a separation agreement.
(2) The man and the child's mother attempted, before the child's birth, to marry each other by a marriage that was solemnized in apparent compliance with the law of the state in which the marriage took place, the marriage is or could be declared invalid, and either of the following apply:
(a) The marriage can only be declared invalid by a court and the child is born during the marriage or within three hundred days after the termination of the marriage by death, annulment, divorce, or dissolution;
(b) The attempted marriage is invalid without a court order and the child is born within three hundred days after the termination of cohabitation.
(3) The man and the child's mother, after the child's birth, married or attempted to marry each other by a marriage solemnized in apparent compliance with the law of the state in which the marriage took place, and any of the following occur:
(a) The man has acknowledged his paternity of the child in a writing sworn to before a notary public;
(b) The man, with his consent, is named as the child's father on the child's birth certificate;
(c) The man is required to support the child by a written voluntary promise or by a court order.
(4) The man, with his consent, signs the child's birth certificate as an informant as provided in section 3705.14 of the Revised Code.
(B) A presumption arises under di-

vision (A)(3) of this section regardless of the validity or invalidity of the marriage of the parents. A presumption that arises under this section can only be rebutted by clear and convincing evidence. If two or more conflicting presumptions arise under this section, the Court shall determine, based upon logic and policy considerations, which presumption controls.

3111.07 Necessary parties; intervenors

(A) The natural mother, each man presumed to be the father under section 3111.02 of the Revised Code, and each man alleged to be the natural father, shall be made parties to the action or, if not subject to the jurisdiction of the court, shall be given notice of the action pursuant to the Rules of Civil Procedure and shall be given an opportunity to be heard. The court may align the parties. The child shall be made a party to the action unless a party shows good cause for not doing so. Separate counsel shall be appointed for the child if the court finds that the child's interests conflict with those of the mother.

3111.08 Procedure

(A) An action brought pursuant to this chapter to declare the existence or nonexistence of the father and child relationship is a civil action

and shall be governed by the Civil Rules unless a different procedure is specifically provided by this chapter.

3111.09 Genetic tests

(A) In any action instituted under this chapter, the court may, upon its own motion or upon the motion of any party to the action that is made at a time so as not to unduly delay the proceedings, order the child's mother, the child, the alleged father, and any other person who is a defendant in the action to submit to genetic tests. Any fees charged for the tests shall be paid by the party that requests them unless the court orders the fees taxed as costs in the action. If the court orders the fees taxed as costs in the action, if the custodian of the child is represented by the agency that is designated in the county to provide enforcement of child support orders under Title IV-D of the "Social Security Act," 49 Stat. 629 (1935), 42 U.S.C. 301, as amended, if the custodian is a recipient of aid to federally dependent children payments for the benefit of the child, and if the defendant in the action is found to be indigent, then the designated child support enforcement agency is authorized, within guidelines contained in federal law, to pass through all costs of the tests. Any costs passed through in such a manner are in addition to any amount provided for under any contractual provision for specific fund-

ing allocations for the agency between the county, the state, and the federal government.

(B) The genetic tests shall be made by qualified examiners who are appointed by the court. The examiners may be called as witnesses to testify as to their findings. Any party may demand that other qualified examiners perform independent genetic tests under order of the court. The number and qualifications of the independent examiners shall be determined by the court.

3111.12 Testimony; jury trial

(D) Any party to an action brought pursuant to this chapter may demand a jury trial by filing the demand within three days after the action is set for trial. If a jury demand is not filed within the three-day period, the trial shall be by the court.

If the action is tried to a jury, the verdict of the jury is limited only to the parentage of the child, and all other matters involved in the action shall be determined by the court following the rendering of the verdict.